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FEDERAL MARITIME COMMISSION

DNB EXPORTS LLC, and)
AFI ELEKTROMEKANIK VE ELEKTRONIK SAN. TIC. LTD. STI.)

Complainants,)

v.)

) DOCKET NO
) 11-07

BARSAN GLOBAL LOJISTIKS VE GUMRUK MUSAVIRLIGI A. S.,)
BARSAN INTERNATIONAL, INC., and)
IMPEXIA INC.)

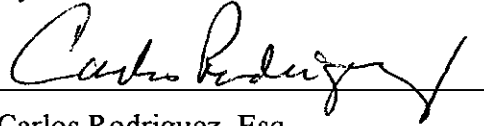
Respondents)

**MOTION TO DISMISS BARSAN GLOBAL LOJISTIKS VE GUMRUK
MUSAVIRLIGI A. S. AND BARSAN INTERNATIONAL, INC.'S
COUNTERCLAIM**

Counter Respondents, AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. ("AFI") and DNB Exports LLC ("DNB"), by and through their attorneys, Rodriguez, O'Donnell, Gonzalez & Williams, P C , hereby move the Federal Maritime Commission (the "Commission") for an Order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, as permitted by § 502.12 and § 502.73 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.12 and 46 C.F.R. § 502.73, to dismiss Barsan Global Lojistiks Ve Gumruk Musavirligi A.S. ("BGL") and Barsan International, Inc.'s ("Barsan Int'l") Counterclaim with prejudice, and to provide any further relief as the Administrative Law Judge ("ALJ") deems just, reasonable and proper.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read 'Carlos Rodriguez', written over a horizontal line.

Carlos Rodriguez, Esq.

Zheng Xie, Esq.

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DNB EXPORTS LLC, and

AFI ELEKTROMEKANIK VE ELEKTRONIK

SAN. TIC. LTD. STI.

Dated in Washington, D.C. this thirteenth day of June, 2011.

MEMORANDUM OF LAW

This Memorandum of Law is submitted in support of Counter Respondents, AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti.'s ("AFI") and DNB Exports LLC's ("DNB") Motion to Dismiss Barsan Global Lojistik Ve Gumruk Musavirligi A. S. ("BGL") and Barsan International, Inc.'s ("Barsan Int'l") Counterclaim (the "Motion"). The basis for the Motion is that the Commission lacks subject matter jurisdiction over BGL and Barsan Int'l's Counterclaim (the "Counterclaim"), because the Counterclaim does not allege violations of the Shipping Act of 1984, as amended (the "Shipping Act"). Notably, BGL and Barsan Int'l do not even attempt to clothe the allegations in the Counterclaim, as well as the corresponding relief sought, with alleged violations of the Shipping Act. Instead, the Counterclaim is based on contractual rights and obligations allegedly owed by AFI and DNB. That the Commission does not have subject matter jurisdiction over the Counterclaim is thus apparent from the pleadings, and the Counterclaim must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Preliminary Statement

As is required for jurisdiction purposes, Complainants filed this action, alleging Shipping Act violations against BGL, Barsan Int'l and Impexia Inc.

BGL and Barsan Int'l answered the Complaint and asserted a Counterclaim against DNB and AFI couched in contract terms. In the Counterclaim, BGL and Barsan Int'l seek payments of alleged debts "for transportation services" in "breach of contract". Clearly, the purported basis for the Counterclaim is an alleged breach of contract and not a violation of the Shipping Act of 1984, as amended.

The gravamen of the Counterclaim are thus clearly not damages to BGL and Barsan Int'l which were allegedly proximately caused by substantive violations of the Shipping Act by Counter Respondents. Rather, the counterclaimed damages are based on purported contractual rights and obligations allegedly owed to BGL and Barsan Int'l by Counter Respondents. Accordingly, the Commission lacks jurisdiction over the Counterclaim, and its must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

To the extent that BGL and Barsan Int'l wish to seek the allegedly outstanding debts from DNB and AFI based on the breach of contract claim, they must do so in an appropriate court or arbitration forum.

Arguments

The factual allegations in the Complaint (Counterclaim hereof) are to be taken as true on a motion to dismiss. A motion to dismiss admits all the factual allegations in the Complaint (Counterclaim hereof) and challenges the Complainant's (Counter Complainants hereof) right to any recovery on the basis of those facts. The Complaint (Counterclaim hereof) must be construed in the light most favorable to the Complainant (Counter Complainants hereof) See *San Diego Unified Port District v. Pacific Maritime Association*, No. 03-12 (Fed. Mar. Comm'n Dec. 30, 2003) (Motion to Dismiss Complaint Granted with Prejudice) (*citing Fuhrer v. Fuhrer*, 292 F.2d 140 (7th Cir. 1961))

Even taking the allegations in the Counterclaim as true, the Commission lacks subject matter jurisdiction over the Counterclaim, and they should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

A. **The Commission Lacks Subject Matter Jurisdiction Over BGL and Barsan Int'l's Counterclaim for Breach of Contract, and the Counterclaim Should Be Dismissed Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.**

1. **BGL and Barsan Int'l's Counterclaim Does Not Seek Rights or Remedies Available under the Shipping Act.**

Section 11(a) of the Shipping Act, 46 U.S.C. § 41301, provides as follows:

(a) IN GENERAL.—A person may file with the Federal Maritime Commission a sworn complaint **alleging a violation of this part**, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, **the complainant may seek reparations for an injury to the complainant caused by the violation** (Emphasis supplied).

This provision of the Shipping Act plainly provides that the complainant (Counter Complainants hereof) must allege violations of the Shipping Act and may seek reparations for an injury to the complainant caused by the violations. In this case, however, BGL and Barsan Int'l merely allege that DNB and AFI are in breach of contract based upon their failure to pay Barsan for transportation services provided. (Counterclaim ¶ 8) This cause of action and the remedies it might provide are neither contemplated by the Shipping Act, nor could they credibly be alleged as such in the Counterclaim. Thus, the rights and remedies sought to be enforced in the Counterclaim do not derive from any rights arising or remedies available under the Shipping Act.

In *International Association of NVOCCs v. ACL et al.*, at 31, No. 81-5 (Fed Mar. Comm'n Feb. 5, 1990) (Order Affirming Dismissal of Collective Bargaining Associations), the ALJ rejected complainants' argument that the various collective bargaining Associations ought to be retained as respondents because they were ultimately responsible for the Rules on Containers, and stated in relevant part:

The Commission “is not a court, and cannot rely...on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress.” *Trans-Pacific Freight Conference of Japan v. FMB*, 302 F.2d 875, 880 (D.C. Cir. 1962). *See generally Stark v. Wickard*, 321 U.S. 288, 309 (1944). Even if an agency is confronted by a new malpractice that it believes ought to be stopped, it may not justify reaching the malfeasor by references to its statute’s general policies, if that results in a circumvention of the limits on its jurisdiction created by the statute’s language and legislative history. *Austasia Intermodal Lines, Ltd. v. FMC*, 580 F.2d at 646-47.

Similarly, in this case, the Commission lacks subject matter jurisdiction because the Counterclaim is based on contractual obligations and alleged activities which, in and of themselves, do not (and are not alleged to) constitute violations of the Shipping Act. As noted in *International Association of NVOCCs*, the Commission is constrained by the statutory limits on its jurisdiction. Based on those constraints, BGL and Barsan Int’l cannot seek redress against AIF and DNB before the Commission based on the theories asserted in the Counterclaim.

2. This Case is Similar to Service Contract Cases Where the Commission Has Held That It Will Not Exercise Jurisdiction over Claims Which Are Contractual in Nature.

It is well settled that the Commission will not entertain claims which raise issues which are solely contractual in nature. The Commission has addressed this topic principally in service contract cases involving 46 U.S.C. § 40502(f), (previously Section 8(c) of the Shipping Act), which states:

Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract **is an action in an appropriate court.** The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.
(Emphasis supplied)

While the above statute specifically addresses whether service contract disputes come within the Commission's jurisdiction, discussion in the controlling case involving service contracts addresses generally the Commission's jurisdiction over matters which are purely contractual. In *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (2000) ("*Cargo one*"), the Commission dealt with a complaint filed by an NVOCC alleging various violations of the Shipping Act relating to its service contract with a VOCC. The Commission noted: "For section 8(c) to have any meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, **as such actions would not be actionable before the Commission in any event.**" *Cargo One*, 28 SRR at 1644 (emphasis supplied). The Commission in *Cargo One* thus established the following test: Are a complainant's allegations inherently a breach of contract claim, or do they also involve elements peculiar to the Shipping Act? In addition, the Commission found: "As a general matter, **allegations essentially comprising contract law claims should be dismissed** unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple breach of contract claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support a claim, that the matter is appropriately before the agency." *Cargo One*, 28 SRR at 1645., *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda. et al*, at 11, No. 02-04 (Fed. Mar. Comm'n May 10, 2006) (Order Vacating ALJ's Dismissal Order and Remanding Proceeding for Further Adjudication) (Quoting *Cargo One*).

Here, the allegations in the Counterclaim are not in the context of a service contract, but rather arise from purported obligations under a transportation contract. Clearly, the only transportation contracts in which non-vessel operation common carriers (“NVOCCs”) can enter contractual arrangements with shippers are NVOCC Service Arrangements (“NSAs”) as that term is defined at 46. C.F.R. § 520.531.3 (p). None of the pleadings aver the existence of an NSA, nor do Counter Complainants allege a breach of an NSA. An NSA entails compulsorily adherence to certain regulatory formalities, none of which are present in this case, nor averred in the pleadings. Accordingly, the Counterclaim asserts straight contract law claims, and under *Cargo One*, should be dismissed for lack of subject matter jurisdiction.

“[S]ection 11 permits reparations **only for violations of the 1984 Act**, which returns the issue to whether the Associations can violate any of the provisions cited by Complainants. There is nothing in the legislative history indicating that section 11 was intended to supplement the subject matter jurisdiction conferred by the various substantive provisions of the Act.” *International Association of NVOCCs v. ACL et al.*, at 33. Without any allegations of violations of the Shipping Act committed by the Counterclaim, the Commission lacks subject matter jurisdiction over the Counterclaim, and this Motion to Dismiss should be granted pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Conclusion

It is respectfully requested, that for all the foregoing reasons, that the ALJ dismiss the Counterclaim against AFI and DNB pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read 'Carlos Rodriguez', written over a horizontal line.

Carlos Rodriguez, Esq.

Zheng Xie, Esq.

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Dated in Washington, D.C. this thirteenth day of June, 2011.

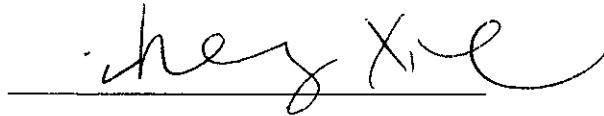
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following individuals by first-class mail:

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Dated in Washington, D.C., this thirteenth of June, 2011.